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In The

Supreme Court of the United States

October Term, 1948

No. 344

O. V. Kessler,
Petitioner,

v.

Thos. P. McGlone, Sr., Executor, Fauquier National Bank, Administrator, C. T. A., of the Estate of Rose Meredith Kessler, Deceased; Thomas F. McGlone, Robert McGlone, Thomas F. McGlone, Jr., Mabel McGlone, Edward B. McGlone, and Agnes J. Keen,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The summary statement of facts in the Petition for Writ of Certiorari being incomplete in many important respects, the respondents restate such facts, with appropriate references to the record, as follows:

Rose Meredith Kessler, now deceased, left her residence in Virginia on February 5, A. D., 1946, and went to Flor-

ida for the purpose of permanent residence. The record in the Trial Court indicates, without contradiction, that she purchased a home (R. 147) and later purchased an adjoining lot to protect her home from a business encroachment (R. 152) and later died there on the 7th day of February, A. D., 1947.

On May 10, A. D., 1946, the said Rose Meredith Kessler filed suit for divorce against her husband, Oliver V. Kessler, in the Circuit Court of the Eleventh Judicial Circuit of Florida. The record indicates that Mrs. Kessler made a bona fide attempt to locate the Defendant, O. V. Kessler, at the time of filing suit (R. 79, 80, 81, 85, 86 and 87). Prior to and during the pendency of the suit, O. V. Kessler resided at a number of Hotels in Washington, D. C., moving about every few days because "they had reservations coming in and they put you out" (R. 73, 74, 75 and 66) and "hotel space is limited to three days, and I keep moving about every day" (R. 68). Whereupon, pursuant to Section 48.04 of the Code of Laws of the State of Florida (R. 158) Mrs. Kessler made her Affidavit to the effect, that after diligent search and inquiry, the residence of O. V. Kessler, as particularly as was known to her, was Washington, D. C. Substituted service by publication was then had in full compliance with the laws of Florida. (R. 104, 105, 106)

On July 17, A. D., 1946, the Circuit Court of the Eleventh Judicial Circuit of Florida entered a final decree of divorce in favor of *Rose M. Kessler vs. O. V. Kessler,* including among its findings, that it had jurisdiction of the parties and of the subject matter (R. 140).

On the 22nd day of July, A. D., 1947, O. V. Kessler filed suit in the Circuit Court of Prince William County, Virginia, against the personal representatives of Rose Meredith Kessler, deceased, and the heirs and legatees of the said decedent, praying that the order of probate of the

will of the decedent be set aside and that the decedent be declared intestate and that Complainant's interest, as the surviving consort of the said decedent "may be established" (R. 11). Whereupon, a special plea was filed by the Respondents alleging that the said Complainant was not the surviving consort of the said Rose Meredith Kessler because of the Order of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. Whereupon, the Complainant, O. V. Kessler, filed a replication alleging that "the late Rose V. (sic) Kessler was not divorced from the Complainant, but that at the time of her death said Complainant and said Rose Meredith Kessler were lawfully and legally husband and wife; that the said Rose Meredith Kessler "was not a resident of the State of Florida" (R. 14). The replication concerned the question of residence of Rose Meredith Kessler alone and did not concern the question of process on O. V. Kessler in the Florida divorce suit. The Circuit Court of Prince William County held that "the divorce is valid" (R. 97).

Thereafter, the Court, by its Order entered on the 20th day of January, A. D. 1948, decreed that the special plea filed by the defendant personal representatives, heirs and legatees "is hereby sustained and the decree of final divorce entered by the Circuit Court in and for the County of Dade, Florida, on the 17th day of July, A. D., 1946, is entitled to full faith and credit in this Court". (R. 17)

O. V. Kessler petitioned the Supreme Court of Appeals of Virginia for an appeal from the order of the Trial Court and, on the 15th day of June, A. D., 1948, the Supreme Court of Appeals of Virginia denied the appeal stating that the petition "having been maturely considered and the transcript of the record of the decree aforesaid seen and inspected, the Court being of the opinion that the said decree is plainly right, doth reject said petition and refuse said appeal. . . ." (R. 99).

2.

ARGUMENT

It is the contention of the Respondents herein that no Federal question is presented to this honorable Court by the petition filed in this cause.

Petitioner lays the jurisdiction of this Court as being under Section 1257 (3) of the Federal Judicial Code effective September 1, A. D., 1948, which concerns cases where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States. Notwithstanding, nowhere in the petition is it alleged that the validity of any state statute has been drawn in question in this case nor is it anywhere stated that any such statute is repugnant to the Constitution, Treaties or Laws of the United States.

The Petitioner contends, on page 2 of the Petition, that the validity and operative effect of the Florida judgment was put in issue by a replication which was filed in the Circuit Court of Prince William County, Virginia, by the Petitioner.

The record conclusively indicates, however, that the only issue presented in the Trial Court was that the decedent was not domiciled in the State of Florida at the time she obtained the divorce and also that the Petitioner received no notice of the pendency of the litigation in Florida. This presented to the Trial Court a clearcut issue of fact as to the jurisdiction of the Florida Court. Testimony was produced by both sides covering this particular issue and the finding of the Trial Court was that the decedent was domiciled in and a resident of the State of Florida at the time that she obtained the divorce and that proper service was had upon the Petitioner under the Florida statute.

The Petitioner in the Trial Court raised no Federal question nor was any Federal question raised in his peti-

tion for a writ of error to the Supreme Court of Appeals of Virginia. The sole exception appearing in the record of the Trial Court is the general exception to the ruling made by the Court in its final order dismissing the cause (R. 15). Upon this sole exception, the Petitioner presented his petition for an appeal to the Supreme Court of Appeals of Virginia which, by its order refusing to grant the appeal, held that the decedent was "plainly right" (R. 99).

The Respondents rely on the case of *Honeyman v. Haney*, 300 U. S. p. 18, wherein this Court held "before we may undertake to review a decision of the Court of a state it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest Court of the State having jurisdiction but, that its decision of the Federal question was necessary to the determination of the cause".

Not only was no Federal question ever presented to the Supreme Court of Appeals of Virginia, or, in fact, to the Trial Court, but, further, the Petitioner in his specifications of error filed with his brief before this honorable Court relies only upon the allegations that the Petitioner did not "have his day in Court". His other specifications resolve themselves with general allegations that the Supreme Court of Appeals of Virginia erred in refusing to grant the appeal. The question of whether or not a party litigant has "his day in Court" is not by any means a Federal question but is one to be determined fully by the Court of the state jurisdiction in which the matter is presented. The Florida Court, the Virginia Trial Court and the Supreme Court of Appeals of Virginia all held in the affirmative that the Petitioner did have his day in Court.

The appearance of a litigant is not necessary in any proceeding where substitute service has been had under the Laws of the State, in order that a final judgment may be had in that proceeding.

Petitioner relies on the companion cases of *Sherrer v. Sherrer*, 68 Sup. Ct. Rep. 1087, and *Coe v. Coe*, 68 Sup. Ct. Rep. 1094, and argues that, since these cases held that full faith and credit must be granted in divorce proceedings where both parties appeared in the Trial Court, conversely full faith and credit should not be granted where there has been no participation in the original proceedings by the persons involved. The Sherrer and Coe cases involve the question of full faith and credit being given to the decision of a sister state and which the Courts of Massachusetts failed to give. In the instant case no such question is involved and the Trial Court in the instant case, upon the plea of the Petitioner, made a judicial re-examination of the jurisdictional questions involved in the obtaining of the Florida divorce. The Trial Court held that the Florida Court had jurisdiction. However, the Sherrer and Coe cases can not be argued conversely since they are under a different classification of cases which are described in Section 237 of the Judicial Code. The Sherrer and Coe cases concern questions where the decision is against the validity of a state statute and cannot be argued conversely where a case is sought to be reviewed in this Court as being repugnant to the Constitution.

3.

CONCLUSION

It is respectfully submitted that the only question concerned in the Petition is one of fact as to whether or not the Petitioner had "his day in Court", a matter decided by the Courts below, that no Federal question is involved and that the Writ of Certiorari should be denied.

Respectfully submitted,

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